Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

REPLY COMMENTS OF VERIZON

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REPLY COMMENTS OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

Broadband is the critical infrastructure of the 21st Century, and Americans' access to broadband services depends on smart infrastructure policy. Removing barriers to wireless broadband infrastructure – small cells in particular – is essential to maintain U.S. leadership in advanced wireless broadband services and to realize the numerous benefits that 4G densification and 5G offer.[2] Government action to speed deployment will unlock transformative economic and social benefits – from smart cities and access to education and healthcare to gains in productivity, sustainability, and public safety.[3] And there is strong evidence that mobile

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] The term "small cells," as used herein, encompasses small wireless facilities including small cells, distributed antenna system nodes, and small 5G base station equipment.

[3] *See, e.g.,* Deloitte, Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation (Jan., 2017), https://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf (concluding that governments must streamline the deployment of wireless infrastructure or communities will miss out on energy, health, transportation, and public safety benefits of 5G).

broadband introduction and penetration cause GDP growth.[4] To remove barriers to wireless broadband facility deployment and pave the way for enhanced 4G and 5G networks, the Commission should take several actions consistent with the proposals and requests for comment in the *Wireless Infrastructure Notice*[5] and *Wireline Infrastructure Notice.*[6] As discussed in our opening comments, the Commission should:

- Clarify that Sections 253 and 332(c)(7) of the Communications Act[7] bar state or local actions that erect substantial barriers to wireless facilities deployment;
- Adopt rules under Section 253 barring certain state or local actions as *per se* unlawful;
- Deem applications granted when the applicable Section 332(c)(7) shot clock expires without action;
- Adopt a 60-day shot clock for certain small cell applications;
- Exclude certain small cells from tribal reviews, provide guidance on when tribal fees are appropriate, and adopt a 30-day shot clock for tribal reviews;
- Modify existing exclusions from historic preservation reviews and adopt a new exclusion for "twilight towers"; and
- Exclude certain facilities constructed in flood plains from redundant environmental reviews.

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[4] Harald Edquist, Peter Goodridge, Jonathan Haskel, Xuan Li, and Edward Lindquist, "How Important Are Mobile Broadband Networks for the Global Economic Development?" (May 24, 2017) at 2, https://spiral.imperial.ac.uk/bitstream/10044/1/46208/2/Goodridge%202017-05.pdf.

[5] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (Apr. 21, 2017) ("*Wireless Infrastructure Notice*").

[6] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Notice of Proposed Rulemaking and Notice of Inquiry, WC Docket No. 17-84 (Apr. 21, 2017) ("*Wireline Infrastructure Notice*").

[7] 47 U.S.C. §§ 253, 332(c)(7).

The record reflects broad support for the Commission's authority to take these targeted actions and the sound policy undergirding them.

These reply comments respond to arguments made by municipal commenters suggesting that the Commission lacks the legal authority to take the actions Verizon and others proposed in their opening comments. Contrary to these arguments, the Commission has the power to adopt meaningful measures to streamline the deployment of wireless siting technology. In particular:

- The Commission has authority to construe the phrase "prohibit or has the effect of prohibiting" in Sections 253 and 332 of the Communications Act. The Commission should: (1) Harmonize the constructions of Sections 253 and 332; (2) Declare that rights-of-way and the municipally-owned poles within them are subject to Sections 253 and 332; (3) Declare that requiring that wireless facilities be placed underground in a manner that effectively prohibits service violates the Act; and (4) Provide guidance about the evidence required to reject a siting application due to aesthetic concerns;

- The Commission has authority to adopt rules under Section 253 to preempt laws that effectively prohibit wireless or wireline service;

- The Commission has the authority to adopt rules under Section 332(c)(7) to promote wireless infrastructure deployment. The Commission should: (1) Adopt a deemed granted remedy under Section 332(c)(7); and (2) Clarify that the term collocation as used in Section 332 is not limited to placements on structures that already house wireless facilities;

- The Commission should make clear that Sections 253 and 332 apply to wireless facilities even if wireless internet access is reclassified as an information service; and

- The Commission has authority to streamline its historic preservation rules.

Verizon's opening comments included specific proposals to enable the United States to maintain its lead in the development and deployment of advanced wireless networks. As described in those comments and below, the Commission has the legal authority necessary to implement those proposals.

II. THE COMMISSION HAS AMPLE AUTHORITY TO CONSTRUE THE PHRASE "PROHIBIT OR HAS THE EFFECT OF PROHIBITING" IN SECTIONS 253 AND 332 OF THE COMMUNICATIONS ACT.

The Commission should interpret the phrase "prohibit or have the effect of prohibiting" to bar any state and local action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" – the standard it first adopted in the *California Payphone* order.[8] It should declare that a local regulation or siting decision "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" where it erects a "substantial barrier" to the provision of telecommunications service. And it should find that a substantial barrier exists where the regulation or decision significantly increases a carrier's costs or otherwise meaningful strains its ability to provide service. Section 253 and Section 332(c)(7) prevent state and local governments from taking actions that "prohibit or have the effect of prohibiting" the provision of wireless telecommunications service.[9] While the courts of appeals have generally recognized that the *California Payphone* standard is the proper one to apply, the Commission has noted that they have not applied this phrase consistently.[10] The Commission has authority to further interpret this phrase, and should, as noted in Verizon's Opening Comments, interpret it to preempt state or local statutes or requirements that erect a "substantial burden" to the provision of wireless service.[11]

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[8] *See Wireless Infrastructure Notice* at ¶ 90 (citing *California Payphone Ass'n Petition for Preemption*, Memorandum Opinion & Order, 12 FCC Rcd 14191, 14206 at ¶ 31 (1997) ("*California Payphone*")).

[9] 47 U.S.C. § 253(a); *see id.* § 332(c)(7)(B)(i).

[10] *See Wireless Infrastructure Notice* at ¶¶ 90-91.

[11] Verizon Opening Comments, at 13-18 (June 15, 2017).

Some municipal commenters claim that the Commission lacks the authority to provide further guidance regarding Section 253.[12] They point to *Sprint Telephony PCS, L.P. v. County of San Diego*, in which the Ninth Circuit adopted the Commission's "materially limits or inhibits" approach to Section 253 and Section 332(c)(7)'s "prohibit or have the effect of prohibiting" language.[13] According to the Ninth Circuit, the unambiguous language of the statute preempts only "an outright prohibition or an effective prohibition," but does not encompass an action that merely "could *potentially* prohibit the provision of telecommunications services."[14] Because the Ninth Circuit rested its opinion on what it deemed the unambiguous meaning of the statutory text, municipal commenters argue that the Commission lacks authority under *Chevron* to revise this interpretation.[15]

But as Verizon noted in its Comments in response to the *WTB Infrastructure Notice*,[16] all courts of appeals have agreed that the *California Payphone* "materially inhibits or limits" standard is the proper standard to apply under Section 253(a).[17] So far, so good. But when the Ninth Circuit applied this standard, it did so in an unduly narrow manner. When discussing

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[12] *See* Comments of Smart Communities and Special Districts Coalition, at 59-60 (June 15, 2017).

[13] 543 F.3d 571, 579 (9th Cir. 2008) (en banc); *see also Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007) (adopting similar approach).

[14] *Sprint Telephony*, 543 F.3d at 579; *see also Level 3 Commc'ns,* 477 F.3d at 532-33 (resting its similar interpretation on "a plain reading of the statute").

[15] *See* Comments of Smart Communities and Special Districts Coalition, at 59-60.

[16] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13371 (WTB 2016) ("*WTB Infrastructure Notice*").

[17] *See* Comments of Verizon at 11, WT Docket No. 16-421 (Mar. 8, 2017) ("Verizon Small Facility Comments").

whether the ordinance at issue acted as an "effective prohibition," the Ninth Circuit determined it did not because it did not "prohibit[]the construction of sufficient facilities to provide wireless services to the County of San Diego."[18] And the court further explained the kinds of regulations that might not survive under Section 253(a): an ordinance requiring that all facilities be underground when in fact only above-ground facilities are functional, or an ordinance that required wireless facilities to be located so far away from a road that no wireless facility could be built.[19] The Commission, in a brief before the United States Supreme Court, warned that this opinion "might be read to suggest an unduly narrow understanding of Section 253(a)'s preemptive scope," as it can "be read to suggest that a Section 253 plaintiff must show effective preclusion – rather than simply material interference – in order to prevail."[20] The Commission stated that it had "concerns" over the Ninth Circuit's application of the *California Payphone* standard, and noted that should it become necessary, the Commission had the authority to "restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements."[21]

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[18] *Sprint Telephony*, 543 F.3d at 579-80.

[19] *Id.* at 580.

[20] *See* Brief of United States as Amicus Curiae on Petitions for Writs of Certiorari at 8, 14, *Level 3 Commc'ns, LLC v. City of St. Louis*, No. 08-626 (U.S. Jun. 26, 2008) (*cert. denied*, 557 U.S. 935 (2009)) ("FCC Amicus Brief").

[21] *Id.* at 14, 18. Some municipal commenters suggest that the Commission should not provide guidance, instead leaving the resolution of any disagreement in the courts or ambiguity in the statute to the Supreme Court. *See* Comments of Fairfax County, Virginia, at 19-22. But the Commission has the authority to interpret the Communications Act and to resolve conflicting interpretations among the courts of appeals. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("*Brand X*"). There is consequently no reason for the Commission to refrain from clarifying the proper interpretation of Sections 253 and 332(c)(7).

The Commission is well within its authority to issue guidance as suggested in its brief before the Supreme Court. The Ninth Circuit found Section 253(a) unambiguous only insofar as it requires actual, and not hypothetical, prohibition. The Ninth Circuit expressly endorsed the Commission's *California Payphone* test as consistent with the statute. The Commission may and should disagree with the Ninth Circuit's *application* of the test, which did not rely on unambiguous statutory text, and required effective preclusion. By providing guidance on how to apply *California Payphone*, the Commission will not be at odds with the Eighth and Ninth Circuit determinations that the text of Section 253(a) is unambiguous. The Commission should provide that guidance by (1) reaffirming the *California Payphone* standard, (2) explaining that the "materially limit or inhibit" language is open-ended enough to have led to inconsistent and sometimes unduly narrow application by the courts, and (3) providing further explanation as to the application of that phrase, and by extension, Section 253(a).

Some municipal commenters disagree, arguing that the *California Payphone* standard is sufficiently clear and that *Sprint Telephony* correctly applies this standard.[22] They contend that *Sprint Telephony* properly requires that wireless providers show that state and local regulations act as an actual prohibition, as opposed to operate in a manner that creates a significant burden or hindrance on the ability provision of wireless service.[23] But as the Commission has articulated, the Ninth Circuit's application is unduly narrow, leading to a standard of "effective preclusion –

[22] *See* Comments of Smart Communities and Special Districts Coalition, at 59-61; Comments of California Public Utilities Commission (CPUC), at 12-13; Joint Comments of League of Arizona Cities et al., at 39-41; Comments of cities in Washington State, at 13-14.

[23] *See* Comments of CPUC, at 12-13; Joint Comments of League of Arizona Cities et al., at 39-41; Comments of cities in Washington State, at 13-14.

rather than material interference."[24] As Verizon noted in its Opening Comments, providers face myriad local policies that interfere with their ability to provide reliable, high speed wireless access to consumers.[25] These policies frustrate the balance Congress attempted to strike in Section 253 between the deployment of fast and reliable telecommunications service, and protecting the reasonable exercise of local authority.

For that reason, the Commission should declare that a local regulation or siting decision "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" where it erects a "substantial barrier" to the provision of telecommunications service.[26] Drawing from analysis in the courts of appeals, such a substantial barrier would exist where the regulation or action either (1) significantly increases a carrier's costs;[27] or (2) otherwise meaningfully strains the ability of a carrier to provide telecommunications service.[28] This standard recognizes that an "effective prohibition" is not an absolute prohibition, and that local actions that exact substantial and material costs on wireless providers "effectively prohibit" the provision of wireless service. This standard addresses the concerns the Commission previously expressed to the Supreme Court, and it will ensure that the

[24] *See* FCC Amicus Brief, at 14.

[25] *See* Verizon Opening Comments, at 5-8, 35-36.

[26] *See id.* at 11; *see also* Verizon Small Facility Comments at 11-14.

[27] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 450 F.3d 9, 19 (1st Cir. 2006) (noting that the regulations at issue would lead to "a substantial increase in costs" to the carrier); *Qwest Corp. v. City of Santa Fe*, *New Mexico*, 380 F.3d 1258, 1270-71 (10th Cir. 2004) (noting that where a requirement will lead to a "massive increase in cost," it acts as an effective prohibition under Section 253(a)).

[28] *See Puerto Rico Tel. Co.*, 450 F.3d at 19 (noting that the requirements at issue would "strain [the carrier's] ability to provide telecommunications services").

next generations of wireless technology are quickly and economically deployed, while also allowing local governments to exercise significant control over siting and zoning issues.

A. THE COMMISSION SHOULD HARMONIZE THE CONSTRUCTION OF SECTIONS 253 AND 332.

1. No Differences Between Sections 253 and 332 Suggest That Their Identical Terms Should Be Interpreted Differently

The Commission noted in the *Wireless Infrastructure Notice* that the ban in Sections 253(a) and 332(c)(7) on local actions that "prohibit or have the effect of prohibiting" the provision of service "appear to impose the same substantive obligations on State and local governments," and that courts have previously held that this identical language should create the same legal standard.[29] Verizon agrees with the Commission's common sense interpretation.[30] Several municipal commenters contest this approach, suggesting that Sections 253(a) and 332(c)(7) are materially different from one another and should be construed differently.[31] These arguments lack merit and should be rejected.

Several commenters suggest that Section 253 is the framework that Congress established to govern the interaction between state and local authority and wireline telecommunications providers, while Section 332 was meant as the sole framework dedicated to the interaction between state and local governments and wireless providers.[32] But, as previously discussed in

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[29] *Wireless Infrastructure Notice*, at ¶ 89 (citing *Sprint Telephony*, 543 F.3d at 759).

[30] *See* Verizon Opening Comments, at 8-11.

[31] *See* Joint Comments of League of Arizona Cities et al., at 37-39; Comments of the Virginia Joint Commenters, at 5; Comments of the League of Minnesota Cities, at 10-14; Comments of the City of New York, at 2-8.

[32] *See, e.g.*, Joint Comments of League of Arizona Cities et al., at 37-39; Comments of the Virginia Joint Commenters, at 5.

Verizon's Small Facility Comments,[33] this argument fails to grapple with the plain language of Section 253(a), which prevents state and local legal requirements from effectively prohibiting "*any* … telecommunications service," not merely wireline telecommunications service.[34] Some wireless services undoubtedly qualify as telecommunications service, and because Section 253(a) applies to all telecommunications service by its plain terms, it applies just as surely to wireless telecommunications as it does to landline service.[35] For this reason, courts routinely apply Section 253(a) to state and local ordinances, regulations, and policies challenged as prohibiting or having the effect of prohibiting the provision of wireless telecommunications service.[36]

Municipal commenters also suggest that Section 253(a) does not apply to wireless siting decisions because Section 332(c)(7) states "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal

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[33] Verizon Small Facility Comments, at 3-6.

[34] 47 U.S.C. § 253(a).

[35] *See, e.g.*, *WTB Infrastructure Notice*, at 13369 ("Sections 253(a) and 332(c)(7) establish that '[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity' to provide personal wireless services or other telecommunications services."); *Sprint Telephony*, 543 F.3d at 575 ("Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a) because, on its face, it prohibits or has the effect of prohibiting Sprint's ability to provide *wireless telecommunications services*.") (emphasis added) (footnote omitted).

[36] *See, e.g.*, *Sprint Telephony*, 543 F.3d at 579–80; *Green Mountain Realty Corp. v. Leonard*, No. 09–11559–RWZ, 2011 WL 1898239, at *4 (D. Mass. May 18, 2011), *aff'd in part, vacated in part*, 688 F.3d 40 (1st Cir. 2012); *T-Mobile W. Corp. v. Crow*, No. CV08–1337–PHX–NVW, 2009 WL 5128562, at *12-14 (D. Ariz. Dec. 17, 2009); *Verizon Wireless (VAW) LLC v. City of Rio Rancho, New Mexico*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007); *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *Lindenthal v. Town of New Castle*, No. 14/3069, 2015 WL 5444478, at *3 (N.Y. Sup. Ct. June 8, 2015).

wireless service facilities."[37] Because Sections 253 and 332 are in the same chapter, municipal commenters argue that Section 253 does not apply to providers of wireless services.[38]

But as Verizon discussed in its Small Facility Reply Comments, this argument misunderstands the different roles played by Sections 253 and 332 with regard to wireless siting matters.[39] Section 332 applies to "decisions regarding the placement, construction, and modification of personal wireless service facilities"[40] – that is, to individual siting decisions rendered by state or local governments. Section 332 offers an avenue of relief for these individualized decisions. Section 253, on the other hand, targets for preemption "State or local statute[s] or regulation[s], or other State or local legal requirement[s]."[41] As courts have consistently recognized, Section 253 applies to a local government's statute, regulation, or similar generally applicable legal requirement that governs wireless providers' attempt to secure access to rights-of-way – such as ordinances that require large separation distances between facilities, impose right-of-way fees, or adopt restrictive equipment size limits.[42] Nothing in Section 332(c)(7)(A), which applies only to "*decisions* regarding the placement, construction,

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[37] 47 U.S.C. § 332(c)(7)(A); *see* Comments of the City of New York, at 3-5.

[38] *See id.* at 3-5.

[39] *See* Verizon Small Facility Reply Comments, at 4-6.

[40] 47 U.S.C. § 332(c)(7)(A).

[41] 47 U.S.C. § 253(a).

[42] *See City of Rio Rancho*, 476 F. Supp. 2d at 1336 ("Section[] 253 … proscribe[s] ordinances that have the effect of prohibiting the ability to provide telecommunications services…. Section 332(c)(7) provides similar proscriptions on individual zoning decisions. The statutes thus provide parallel proscriptions for ordinances and individual zoning decisions."); *City of San Marcos*, 204 F. Supp. 2d at 1277 ("Where 47 U.S.C. § 253 provides a cause of action against *local regulations*, section 332 gives a cause of action against *local decisions*.").

and modification of personal wireless service facilities,"[43] precludes a cause of action under Section 253 against local regulations or ordinances that prohibit or have the effect of prohibiting the provision of wireless telecommunications service.[44]

The plain language of Sections 253 and 332 supports a distinction between preemption of local ordinances and practices and preemption of individual siting decisions – and allows wireless providers to challenge the former under Section 253. At most, the interplay between these statutes creates an ambiguity that the Commission has authority to resolve. Indeed, the fact that courts have construed Section 332(c)(7)(A) to apply only to individual siting decisions[45] shows that the provision does not so clearly support the municipalities' interpretation as to require the Commission to adopt it.[46] No argument advanced by the municipal commenters suggests that the statutory language unambiguously requires their interpretation, meaning there is no reason for the Commission to refrain from applying Section 253 to statutes, regulations, or similar generally applicable requirements or practices that effectively prohibit the provision of wireless service.

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[43] 47 U.S.C. § 332(c)(7)(A) (emphasis added).

[44] This distinction also explains why Section 6409 of the Spectrum Act, 47 U.S.C. § 1455, expressly notes that it takes precedence over Section 332(c)(7), but is silent with regard to Section 253. It is not, as one municipal commenter claims, because Section 253 is not meant to apply to wireless technology at all. *See* Comments of the City of New York, at 5. Instead, Section 6409 applies only to state and local decisions to approve or deny "eligible facilities request for a modification of an existing wireless tower or base station" – that is, to *individual siting decisions*. 47 U.S.C. § 1455. Because Section 332(c)(7) is the provision of the Communications Act that addresses state and local authority with regard to wireless siting decisions – while Section 253 addresses preemption of state and local ordinances and policies – it makes sense that Section 6409 would address its relationship to Section 332(c)(7).

[45] *See City of Rio Rancho*, 476 F. Supp. 2d at 1336; *City of San Marcos*, 204 F. Supp. 2d at 1277.

[46] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

Finally, some commenters point out that Section 332(c) and Section 253 do not erect identical regulatory schemes. Instead, they note, Section 332(c) contains some protections for and limitations on wireless providers that Section 253 does not.[47] That is surely true: Section 332 contains many provisions specific to the regulation of wireless telecommunications services.[48] But nothing in these more specific provisions suggests either that Section 253 does not apply to wireless service or that the terms "prohibit or have the effect of prohibiting" the provision of service should be interpreted differently in Sections 253 and 332(c). To the contrary, Congress's use of identical language suggests just the opposite: that "prohibit or have the effect of prohibiting" should be construed in harmony.[49] Municipal commenters' position would require the Commission to interpret Section 253(a) in a manner inconsistent with both its plain language and its interpretation by the courts, and should therefore be rejected.

[47] *See* Joint Comments of League of Arizona Cities et al., at 38-39; Comments of the City of New York, at 3-5.

[48] *See, e.g.*, 47 U.S.C. § 332(c)(3) (laying out preemption rules for market entry and rates for wireless telecommunications providers); *see id.* § 332(c)(7)(iv) (limiting state and local regulatory authority based on environmental concerns of radio frequency emissions).

[49] *See Sprint Telephony*, 543 F. 3d at 579 ("We see nothing suggesting that Congress intended a different meaning of the text 'prohibit or have the effect of prohibiting' in the two statutory provisions, enacted at the same time, in the same statute."); *see generally Gustafson v. Alloyd Co.,* 513 U.S. 561, 570 (1995) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

2. The Commission Should Adopt a "Substantial Barrier" Standard Under Section 332(c)(7).

The Commission should not, as some municipal commenters argue, adopt the "significant gap" analysis employed by some courts of appeals[50] for determining when a wireless siting decision acts to "prohibit or have the effect of prohibiting" the provision of service under Section 332(c)(7)(B)(II).[51] As Verizon explained in its Opening Comments, this "significant gap" analysis, which has no connection to the statutory text and has never been embraced by the Commission, fails to strike a proper balance between state and local authority and the important federal interest in promoting robust wireless broadband service, particularly as technology evolves.[52]

This standard is problematic in two key ways. First, because it allows a state or locality to deny a permit so long as a network can provide some level of service, it does not allow providers to deploy advanced technology. The Commission has made clear that wireless broadband technology, and the required investment to improve coverage, speed, and capacity beyond the capability of 3G networks, is vital to the nation's economic growth, to civic life, and to individual consumers.[53] But the "significant gap" test frustrates efforts to promote broadband deployment by allowing localities to deny applications simply because a carrier already supplies

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[50] *See, e.g.*, *MetroPCS, Inc. v. City & Cty. of San Francisco,* 400 F.3d 715, 733–34 (9th Cir. 2005) *abrogated by T-Mobile S., LLC v. City of Roswell, Ga.,* 135 S. Ct. 808 (2015); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999).

[51] *See, e.g.*, Joint Comments of League of Arizona Cities et al., at 37-45.

[52] *See* Verizon Opening Comments, at 16-18.

[53] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12869-70 at ¶¶ 6-7 (2014) ("*2014 Infrastructure Order*"), erratum, 30 FCC Rcd 31 (2015), *aff'd, Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

3G service.[54] Second, the test requires that carriers show (at minimum) that their site is the least intrusive means of closing any gap in coverage. This places a heavy burden on carriers to show that no other site could fulfill their purposes. While some municipal commenters support this "fact-intensive," burdensome review that places substantial costs on providers,[55] the standard undercuts the Commission's stated goal of supporting rapid deployment of the next generation of wireless technology. Conversely, adopting the "substantial burden" framework for Section 332(c)(7) – as well as for Section 253(a) – is both more consistent with the text and structure of the Act and better achieves the balance between respecting local authority and encouraging the development of the next generation of cellular technology.[56]

3. Sections 253(b) and (c) Do Not Limit the Commission's Authority to Interpret Section 253(a).

The preservation of local authority in Sections 253(b)-(c) serves an important purpose in accommodating legitimate state and local interests, but these provisions are more limited than municipal commenters suggest. Section 253(a) provides for preemption of state and local zoning policies that "prohibit or have the effect of prohibiting" the provision of telecommunications service,[57] but the statute carves out limited exceptions in Sections 253(b)-(c) for state or local legal requirements that would otherwise run afoul of Section 253(a).[58] Some municipal

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[54] *But see Orange County-Poughkeepsie Ltd. P'ship. v. Town of East Fishkill*, 84 F.Supp.3d 274, 281-282 (S.D.N.Y.), *aff'd*, 632 F.Appx. 1 (2d Cir. 2015) (noting that a significant gap was present where, *inter alia*, an additional tower was required in order to upgrade service from 3G to 4G).

[55] *See* Joint Comments of League of Arizona Cities et al., at 44.

[56] *See* Verizon Opening Comments, at 11-18.

[57] *See* 47 U.S.C. § 253(a).

[58] *See id.* § 253(b) ("Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary

commenters suggest, however, that Section 253(c) more generally preserves *all* state and local zoning authority.[59] The commenters quote a previous Commission order, which noted that the legislative history of the Act states that Section 253(c) would permit states and localities to "enforce local zoning regulations."[60] Contrary to the commenters' efforts to read a broad, atextual interpretation into Section 253, the statute makes very clear precisely which local zoning restrictions it preserves. Where a zoning restriction violates Section 253(a), that requirement may nonetheless be saved by Sections 253(b) or 253(c), which provide limited safe harbors from federal preemption. Where, however, a local zoning restriction prohibits or has the effect of prohibiting the provision of telecommunications service, and no provision of Section 253(b) or Section 253(c) applies, that local legal requirement is subject to preemption.

B. RIGHTS-OF-WAY AND THE MUNICIPALLY-OWNED POLES WITHIN THEM ARE SUBJECT TO SECTIONS 253 AND 332 OF THE COMMUNICATIONS ACT.

Sections 253 and 332 apply to rights-of-way and municipally-owned poles within them. The Commission sought comment on the application of Sections 253 and 332 to property owned and controlled by state and local governments, particularly the distinction between those

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to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."); *id.* § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.").

[59] *See* Joint Comments of League of Arizona Cities et al., at 46.

[60] *In the Matter of Classic Telephone, Inc.*, CCB Pol 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13103 at ¶ 39 (Oct. 1, 1996) (quoting 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)).

governments acting in a proprietary versus regulatory capacity.[61] Verizon explained in its Opening Comments that local governments act in their regulatory capacity when they manage access to rights-of-way and the poles they own within those rights-of-way.[62] Several municipal commenters dispute this contention. Some suggest that it is too difficult to draw a distinction between localities acting in their proprietary capacities and their regulatory capacities.[63] Others contend that municipalities own their rights-of-way and operate them in a proprietary capacity, meaning that the Communications Act does not preempt local actions taken regarding rights-of-way or the poles within them.[64] Still others suggest that any federal preemption of state laws will force localities to violate state constitutions.[65] None of these arguments has merit.

As an initial matter, the Commission is capable of drawing distinctions between state agencies and localities acting in proprietary and regulatory capacities, relying on the test outlined by the courts. As Verizon noted in its Opening Comments, courts have looked to whether the state or local government's "interactions with the market [are] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely

[61] *See Wireless Infrastructure Notice*, at ¶ 96.

[62] *See* Verizon Opening Comments, at 25-29.

[63] *See, e.g.*, Comments of Smart Communities and Special Districts Coalition, at 62-64; Comments of the City of New York, at 2-3.

[64] *See, e.g.*, Joint Comments of League of Arizona Cities et al., at 47-50; Comments of cities in Washington State, at 9-10.

[65] *See, e.g.,* Comments of the City of Arlington, Texas, at 2-4; Comments of the City and County of San Francisco, at 29-30 ("San Francisco Comments").

ruled out."[66] In making this determination, courts consider "(1) whether 'the challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,' and (2) whether 'the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.'"[67] This test applies to both municipalities and state entities such as state Departments of Transportation.[68] The Commission, just as surely as the courts, can apply this test to determine whether a locality's or a state Department of Transportation's management of its rights-of-way and the government-owned poles within them is a proprietary or regulatory function.

Under this framework, states and localities manage public rights-of-way in their regulatory, not proprietary, capacities. As the Commission has noted, "[c]ourts have held that municipalities generally do not have a compensable 'ownership' interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public."[69] "It is a widely accepted principle of long standing that '[t]he interest [of a city in its streets] is exclusively publici juris,

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[66] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)) (internal quotation marks omitted).

[67] *Id*. (alteration in original) (quoting *Cardinal Towing*, 180 F.3d at 693).

[68] *See Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 231-232 (1993) (applying this standard to a state agency).

[69] *See Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5160 at ¶ 134 (2007) ("*Cable Franchising Report and Order*"), *petition for review denied*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage.'"[70] Because they manage public rights-of-way for the public good, and not solely their own interest, state and local governments do not possess a proprietary interest in rights-of-way. For this reason, many courts "have recognized that the ownership interest municipalities hold in their streets is 'governmental,' and not 'proprietary.'"[71] Municipal commenters have presented no legal precedents that undermine these long-established principles.[72] And the same is true for the lampposts and streetlights within rights-of-way, which are present to enhance public safety – a classic regulatory role – and not to advance a locality's economic agenda. They therefore do not act solely in their own economic interest, as would a private party, in constructing these poles.[73]

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[70] Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 213 (2002) (alterations in original) (quoting People v. Kerr, 27 N.Y. 188, 200 (1863)).

[71] *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (citing *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of N.Y. v. Bee Line, Inc.*, 284 N.Y.S. 452, 456 (App. Div. 1935), *aff'd*, 3 N.E.2d 202 (N.Y. 1936)); *see also City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

[72] For a more complete explanation of the distinction between localities' proprietary and regulatory roles, *see* Verizon Opening Comments, at 25-29.

[73] *See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707-08 at ¶ 19 (1999) (noting that preemption under Section 253 was appropriate because "Minnesota is not merely acquiring fiber optic capacity for its own use"). Where a governmental entity could show that the light from its light pole was being used solely for government purposes, and not for the public at large, then a governmental entity would be able to argue that it was operating the lamppost in its proprietary capacity. But so long as it is engaging in the provision of public services, the state's or locality's interest would fall squarely on the regulatory side of the divide. This analysis is consistent with the approach taken by the Commission in 2014 with regard to the Spectrum Act. There, the Commission distinguished between a local government acting similarly to a private property owner and pursuing its "purely proprietary interests," and its

Municipal commenters also contend that applying Sections 253 and 332(c)(7) to their regulation of rights-of-way and poles within them would force them to run afoul of state constitutions, some of which require municipalities to obtain market rates for use of public property. But the Supremacy Clause takes precedence over any state law, meaning that these state constitutional provisions would lack force in the face of contrary federal law.[74] Moreover, these contentions prove too much: If the Commission were to avoid conflict with state constitutions that require localities to receive market value for any leasing of state property, even local requirements that effectively prohibit the provision of wireless service would escape preemption, so long as any alternative solution did not return a market rate to the locality. This neutering of the Communications Act cannot be what Congress intended.

Finally, contrary to the argument of some municipal commenters, applying Sections 253 and 332 to rights-of-way would not effect a taking under the Fifth Amendment of the Constitution.[75] As discussed in Verizon's Small Facility Reply Comments, because localities hold rights-of-way in trust for the benefit of the public, they lack the relevant property rights that are required for a taking.[76] The Commission rejected this very argument in its *Cable Franchising Report and Order*, noting that "municipalities generally do not have a compensable 'ownership' interest in public rights-of-way, but rather hold the public streets and sidewalks in

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actions as a regulator of public lands or other resources. *2014 Infrastructure Order*, 29 FCC Rcd at 12964 at ¶ 239.

[74] *See* San Francisco Comments at 29-30.

[75] *See id*.

[76] *See* Verizon Small Facility Reply Comments, at 20-23.

trust for the public."[77] Similarly, some municipal commenters claim that limiting "fair and reasonable compensation" in Section 253(c) violates the Fifth Amendment,[78] but it is well-established that rates are not confiscatory so long as they allow for full cost recovery.[79] Municipal commenters simply recycle arguments here that the Commission has previously rejected, and it should do so again here.[80]

C. REQUIRING PLACEMENT OF WIRELESS FACILITIES UNDERGROUND IN A MANNER THAT EFFECTIVELY PROHIBITS SERVICE VIOLATES THE COMMUNICATIONS ACT.

The Commission has authority to place limits on state and local undergrounding requirements. As the Commission noted in the *Wireless Infrastructure Notice*, some municipalities require that utilities place all new infrastructure underground, including wireless infrastructure.[81] Municipal commenters defend these prohibitions, claiming that the Commission

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[77] *Cable Franchising Report and Order*, 22 FCC Rcd. at 5160 at ¶ 134.

[78] *See, e.g.*, Comments of Cities in Washington State, at 11-13.

[79] "Regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible," and rates are not "confiscatory" so long as they allow for full cost recovery. *See FCC v. Florida Power Corp.,* 480 U.S. 245, 253 (1987). *See also* Verizon's Small Facility Reply Comments, at 22-23.

[80] Some localities argue that limiting compensation violates the Tenth Amendment, *see, e.g.*, Comments of Smart Communities and Special Districts Coalition, at 76-77. These arguments fare no better. Under the Commerce Clause, the Commission has the authority to regulate the construction of national telecommunications infrastructure. *See, e.g.*, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000). And because the Commission requires no affirmative conduct by state or local authorities, any limits it places on compensation collected by localities does not violate the anti-commandeering doctrine. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *Cable Franchising Report and Order*, 22 FCC Rcd. at 5160 at ¶ 136 (rejecting argument that the Commission's regulation of cable franchising violates the Tenth Amendment and the anti-commandeering doctrine). *See also* Verizon Small Facility Reply Comments, at 23 n.83.

[81] *See Wireless Infrastructure Notice*, at ¶ 98.

lacks the authority to preempt such requirements because localities are permitted to determine that infrastructure should be placed underground, and because mandating undergrounding does not create an effective prohibition on the provision of wireless service.[82] These arguments are unavailing.

Although much utility infrastructure, such as electric, landline telephone, and cable lines, can be placed underground without disrupting service, wireless network facilities cannot function underground.[83] For this reason, as recognized by the Ninth Circuit, where an ordinance requires all utility facilities, including wireless facilities, to be underground, and consequently prevents wireless facilities from functioning, "the ordinance would effectively prohibit [a wireless carrier] from providing services."[84] Municipal commenters contend that the Communications Act does not apply to undergrounding restrictions, but they offer no text-based support for this claim. Section 253(a)'s language is broad, encompassing any "State or local statute or regulation, or other State or local legal requirement [that] may prohibit or have the effect of prohibiting" the provision of wireless service.[85] Undergrounding requirements, as much as other local land use restrictions, are local ordinances or regulations for purposes of Section 253.

One municipal commenter suggests that undergrounding poses no barrier to the provision of wireless service because "wireless facilities could easily be placed on private property."[86]

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[82] *See* Comments of Smart Communities and Special Districts Coalition, at 71-77; Comments of the Virginia Joint Commenters, at 7-8; Comments of the Colorado Communications and Utility Alliance et al., at 23-24.

[83] *See Wireless Infrastructure Notice*, at ¶ 98.

[84] *Sprint Telephony*, 543 F.3d at 580.

[85] 47 U.S.C. § 253(a).

[86] Comments of Smart Communities and Special Districts Coalition, at 72.

This argument proves too much, as it could be made in response to any request for access to municipal rights-of-way for wireless infrastructure. But in Section 253, Congress determined that access to private property was not sufficient to ensure the provision of telecommunications service, setting up a framework through which providers could access public rights-of-way. As a result, any argument that suggests that access to facilities on private property is a sufficient solution to ensuring the effective provision of wireless technology disregards Congress's contrary view that access to rights-of-way is necessary for providers of telecommunications services.

D. THE COMMISSION CAN AND SHOULD PROVIDE A FRAMEWORK FOR CONSIDERING AESTHETIC CONCERNS.

Several municipal commenters take issue with the Commission's proposal[87] to provide further guidance regarding denial of a siting application under Section 332(c)(7) for aesthetic reasons.[88] They suggest that any Commission involvement will turn it into a "national zoning board."[89] The Commission has proposed no such arrangement, and Verizon does not advocate that the Commission substitute its judgment for that of localities in individual cases. Instead, and consistent with numerous courts of appeals,[90] the Commission should issue guidance that makes clear that denials of siting applications based on aesthetics must rely on evidence of the specific

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[87] *See Wireless Infrastructure Notice*, at ¶ 96.

[88] *See, e.g.*, Comments of the Virginia Joint Commenters, at 5-6; Comments of the Colorado Communications and Utility Alliance et al., at 17-18; San Francisco Comments at 27-28; Comments of the National League of Cities, at 4-5; Comments of Fairfax County, Virginia, at 24-25.

[89] Comments of the Colorado Communications and Utility Alliance et al., at 17.

[90] *See, e.g.*, *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994-95 (9th Cir. 2009); *U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 256 (5th Cir. 2004).

impact of the proposed facility at issue instead of mere "generalized concerns" about wireless infrastructure.[91] Such a rule would not inject the Commission into individual zoning decisions, but would instead formalize the position of numerous courts of appeals, in order to provide greater transparency to carriers and localities on the zoning process. This kind of guidance, which would clarify what is required in order to support a zoning decision with "substantial evidence in a written record," is precisely the kind of interpretive role that the Commission is well positioned to play.

In addition, the Commission should issue a rule that excepts small cells that meet previously adopted size limits,[92] and that are mounted on existing structures (or similar replacement structures) designed to accommodate small cells, from review by local authorities for aesthetic concerns. As described in Verizon's Opening Comments, because these facilities require no new construction that alters the appearance of the neighborhood in a material way, rejecting them for aesthetic reasons will never be supported by the kind of detailed, specific findings necessary to serve as substantial evidence.[93] These general rules are eminently reasonable and will not require the Commission to weigh in on the individual zoning decisions regularly made by local governments.

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[91] *See* Verizon Opening Comments, at 19-20.

[92] *See Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016), codified at 47 C.F.R. Pt. 1, App'x B, § VI.A.5 (a) and (b)(i) (excepting from historic preservation small cells that are three cubic feet per antenna, no more than six cubic feet for all antennas, or 28 cubic feet for associated equipment).

[93] *See* Verizon Opening Comments, at 20.

III. THE COMMISSION HAS AUTHORITY TO ADOPT RULES UNDER SECTION 253 TO PREEMPT LEGAL REQUIREMENTS THAT EFFECTIVELY PROHIBIT SERVICE.

The Commission has authority to adopt rules that preempt local laws or other legal requirements that "prohibit or have the effect of prohibiting" wireless or wireline telecommunications service.[94] But several municipal commenters contend that the Commission lacks authority to adopt rules under Section 253(a). These arguments misunderstand Section 253 and invent restrictions on the Commission's rulemaking authority not present in the statute.

Some municipal commenters incorrectly argue that Section 253(d) limits the Commission's rulemaking authority. That provision states:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[95]

Municipal commenters suggest that Section 253(d) outlines the sole means by which the Commission may preempt state and local policies: in a case-by-case adjudication, after notice and comment, of an individual state or locality's ordinance, regulation, or policy.[96] According to one commenter, Section 253(d) establishes a "clear line" of what is permissible agency action, and a general rulemaking crosses that line.[97]

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[94] *See* Verizon Opening Comments, at 29-33.

[95] 47 U.S.C. § 253(d).

[96] *See* Comments of Smart Communities and Special Districts Coalition, at 57-58; Comments of CPUC, at 9-11.

[97] Comments of the Virginia Joint Commenters, at 2-4.

Municipal commenters are wrong to interpret Section 253(d) as a limit on Commission's general rulemaking authority.[98] Instead, Section 253(d) imposes an affirmative obligation on the Commission: If, after notice and comment, the Commission finds a violation of Section 253(a) or (b), it must preempt. But that mandate does not suggest that the Commission can act only in this manner, or otherwise deprive the Commission of its authority to interpret Section 253.[99] On the contrary, Section 253(d) constrains the Commission's discretion in one respect only (requiring it to preempt violations of Section 253(a) or (b) presented to it), thereby leaving unaffected its discretion in all other respects, including its discretion to interpret Section 253. Absent any such restraint, the Commission is free, under black letter administrative law, to proceed via either rulemaking or adjudication in interpreting a statute within its jurisdiction.[100]

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[98] That authority is explicitly provided in the Act, which states: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." *See* 47 U.S.C. § 201(b). The Supreme Court has explained that "[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include[s provisions] . . . added by the Telecommunications Act of 1996." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (internal quotation marks omitted); *see also Brand X*, 545 U.S. at 980-81 (where the Communications Act is ambiguous, Section 201(b) "give[s] the Commission the authority to promulgate binding legal rules" that "fill the statutory gap in reasonable fashion"); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866, 1871-73 (2013) (upholding FCC authority, pursuant to Section 201(b), to issue rules interpreting Section 332).

[99] *Cf. N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010) (holding that even where the plain language of Section 201(b) of the Communications Act arguably indicated that no Commission guidance was necessary, because the statute possesses broad language, "it is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation").

[100] *See Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) (noting that Commission "has very broad discretion to decide whether to proceed by adjudication or rulemaking"); *City of Arlington v. FCC*, 668 F.3d 229, 240 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) ("Agencies typically enjoy 'very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.'") (quoting *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made

For this reason, the Commission is correct to propose that it interpret Section 253(d)'s adjudicatory process as one non-mandatory approach for determining violations of Section 253, but one that does not prevent the Commission from adopting binding rules interpreting the other provisions of Section 253.[101] The authority – and indeed the obligation – to correct violations of a statute via an adjudication after notice and comment in no way precludes the Commission from defining such violations through adoption of general rules where an appropriate records justifies doing so. In any event, at minimum, the effect of Section 253(d) on the Commission's authority to adopt rules implementing the other provisions of Section 253 is ambiguous. Under *Chevron* and *City of Arlington*, the Commission has the latitude to construe the extent of its statutory authority so long as that interpretation is reasonable.[102] Construing Section 253 to allow the Commission to adopt general rules easily meets this standard.[103]

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between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[101] *See Wireline Infrastructure Notice* at ¶ 110.

[102] See *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *City of Arlington*, 133 S. Ct. at 1868-69.

[103] Some municipal commenters suggest, in addition, that the Commission lacks the authority to adopt rules interpreting Section 253's application to state and local wireless siting policies because Section 253 does not apply to wireless facilities at all. *See, e.g.*, Comments of Smart Communities and Special Districts Coalition, at 56-57; Comments of the Colorado Communications and Utility Alliance et al., at 15-16; ; San Francisco Comments at 22-26. But for the reasons previously discussed in Section II.A, *supra,* as well as in Verizon's Small Facility Reply Comments, at 3-6, this argument is contrary to the plain text of Section 253.

IV. THE COMMISSION SHOULD ADOPT RULES UNDER SECTION 332(C)(7) TO PROMOTE WIRELESS INFRASTRUCTURE DEPLOYMENT.

A. THE COMMISSION HAS AUTHORITY TO ADOPT A DEEMED GRANTED REMEDY UNDER SECTION 332(C)(7).

The Commission has ample authority to adopt a deemed granted remedy under Section 332(c)(7) for wireless siting applications that are not acted upon within a reasonable time.[104] The Commission outlined three possible avenues for providing a deemed granted remedy: an irrebuttable presumption, a lapse in state and local authority, and a preemption rule. It has the authority to adopt a deemed granted remedy through any or all of those approaches. The Commission should reject municipal commenters' arguments to the contrary and adopt a deemed granted remedy.

Some municipal commenters argue that the Commission lacks the authority to adopt an irrebuttable presumption because such a presumption would replace a judicial remedy with an administrative one.[105] They reject a comparison to the irrebuttable presumption adopted under Section 6409 of the Spectrum Act, because that statute states that "a State or local government may not deny, and shall approve, any eligible facilities request,"[106] while Section 332(c)(7) lacks the same "shall approve" language.[107] But the statutory text and past Commission practice support an irrebuttable presumption under Section 332(c)(7). Section 332(c)(7) states that "[a]ny person adversely affected by any … failure to act by a State or local government … *may*, within

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[104] *See* Verizon Opening Comments, at 36-40.

[105] *See, e.g.,* Comments of Smart Communities and Special Districts Coalition, at 39-41; Joint Comments of League of Arizona Cities et al., at 14-15; Comments of Fairfax County, Virginia, at 10-17.

[106] 47 U.S.C. § 1455(a)(1).

[107] *See* Comments of Smart Communities and Special Districts Coalition, at 39-41.

30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[108] The statute thus provides a permissive remedy in Article III courts, but nonetheless leaves room for the Commission to provide additional, administrative remedies, such as an irrebuttable presumption.

The Commission's adoption of an irrebuttable presumption for a similar statute lends further support for this interpretation. Section 621(a)(1) of the Communications Act prevents local cable franchising authorities from "unreasonably refus[ing] to award an additional competitive franchise," and, like Section 332(c)(7), provides that an aggrieved applicant "may" appeal to an Article III court.[109] The Commission adopted a shot clock under this section and provided that if a franchising authority did not render a decision on an application within the applicable time period, the franchising authority would be deemed to have granted the application.[110] The Sixth Circuit denied a challenge to the order, rejecting the argument that the deemed granted remedy exceeded the Commission's authority and "den[ied] community needs and interests."[111] Adopting an irrebuttable presumption is thus consistent with a previous Commission interpretation of a similarly structured statute, which was upheld by a court of appeals as a reasonable construction of that statute.[112]

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[108] 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added).

[109] 47 U.S.C. § 541(a)(1).

[110] *See Cable Franchising Report and Order*, 22 FCC Rcd 5103 at ¶ 4, 5127-28 at ¶ 54, 5132 at ¶ 62, 5134-35 at ¶ 68, 5139-40 at ¶¶ 77-78.

[111] *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 778 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

[112] Municipal commenters also err when they suggest that Section 332(c)(7) requires courts to take into account "the nature and scope of each request" by a carrier. *See, e.g.*, Comments of Fairfax County, Virginia, at 13. Although Section 332(c)(7)(B)(ii) requires that a locality act on each application "within a reasonable period of time… taking into account the nature and scope

For similar reasons, the Commission has the authority to promulgate a rule that establishes a "deemed granted" remedy. The Commission has general rulemaking authority to carry out the provisions of the Communications Act,[113] and the Fifth Circuit and the Supreme Court confirmed this authority with respect to Section 332 specifically in *City of Arlington v. FCC*.[114] Municipal commenters again suggest that this general authority is somehow trumped by the presence of a judicial remedy in the statute.[115] But as noted above, this permissive judicial remedy does not rob the Commission of its authority to issue rules that interpret Section 332. As the Sixth Circuit noted in upholding the deemed granted remedy for Section 621(a)(1), "the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision."[116]

Nor are municipal commenters correct that a contrary statement in the legislative history prevents the Commission from issuing a preemption rule.[117] The Conference Report states: "It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall

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of such request,"[112] the requirement to examine the individual scope of each request is directed at the local government, not to a reviewing court. It is consequently entirely consistent with the text of Section 332(c)(7) for the Commission to provide guidance regarding the maximum amount of time that may be deemed "reasonable" for localities to review different categories of applications.

[113] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[114] 47 U.S.C. § 201(b); *see* 133 S. Ct. at 1866, 1871–73 (finding that the Commission has the authority to interpret Section 332); 668 F. 3d at 249.

[115] *See, e.g.*, Comments of Smart Communities and Special Districts Coalition, at 42-43.

[116] *Alliance for Cmty. Media,* 529 F.3d at 774.

[117] *See, e.g.*, Comments of League of Arizona Cities et al., at 14-15; Comments of Smart Communities and Special Districts Coalition, at 42-43.

have exclusive jurisdiction over all . . . disputes arising under this section."[118] This legislative history cannot overcome the clear statutory text, as interpreted by the Supreme Court in *Iowa Utilities Board* and *City of Arlington*, that provides the Commission with broad rulemaking authority to implement the Communications Act, including Section 332.[119] As the Commission notes, where a statute's language is clear and unambiguous, courts do not allow contrary legislative history to overcome that clear meaning.[120]

The Fifth Circuit in *City of Arlington* examined this very legislative history and found it ambiguous as "to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments."[121] It found that the legislative history expressed Congress's intent "to bar the FCC from imposing additional limitations on state and local government authority. It does not indicate a clear intent to bar FCC implementation of the limitations already expressly provided for in the statute."[122] Because a general preemption rule would not impose additional limitations on state and local authority, but would instead interpret and implement limitations on state and local authority already expressed in Sections 332(c)(7)(B)(ii) and (v), a preemption rule is not at odds with this legislative history.

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[118] S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

[119] *See* 47 U.S.C. §§ 201(b); 303(r).

[120] *See Wireless Infrastructure Notice* at ¶ 16; *see also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (in spite of "contrary indications in the statute's legislative history[,] . . . we do not resort to legislative history to cloud a statutory text that is clear"); *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1569 (D.C. Cir. 1987) ("We will not permit a committee report to trump clear and unambiguous statutory language.").

[121] *City of Arlington*, 668 F. 3d at 253.

[122] *Id.*

Finally, the Commission could reasonably interpret Section 332(c)(7) to deprive state and local governments of authority to act on applications after a reasonable period for review has expired. Section 332(c)(7)(A) preserves state and local authority over siting applications "[e]xcept as provided in this paragraph," and Section 332(c)(7)(B)(ii) states that those authorities "shall act on any request … within a reasonable time." The statute does not state the consequences of failure to act in a reasonable period of time, and the agency has authority to fill this gap by divesting localities that fail to act of approval authority. Because states and localities would consequently lack the authority that is otherwise preserved by Section 332(c)(7)(A), they would not be able to approve or deny any application. The Commission could make clear that in such circumstances, the applicant would be free of the need to secure local approval. Although municipal commenters strenuously object to this interpretation,[123] none has argued that the statutory text unambiguously forecloses it. The interpretation is reasonable and would most effectively advance federal policy in encouraging infrastructure deployment, and the Commission can consequently adopt it.[124]

B. THE TERM "COLLOCATION" AS USED IN SECTION 332 IS NOT LIMITED TO PLACEMENTS ON STRUCTURES THAT ALREADY HOUSE WIRELESS FACILITIES.

The Commission should reject efforts to narrow the definition of collocation for purposes of applying the Section 332(c)(7) shot clocks. Contrary to the claims made by the City and County of San Francisco, the term "collocation" as used in the Section 332(c)(7) shot clock rulings is not limited to "installing telecommunications equipment on a structure or within a

[123] *See, e.g.*, Comments of Smart Communities and Special Districts Coalition, at 42; Joint Comments of League of Arizona Cities et al., at 23.

[124] *See Chevron,* 467 U.S. at 844.

building where there are other existing telecommunications facilities."[125] In establishing the Section 332(c)(7) shot clocks, the Commission relied on the definition of collocation in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.[126] That agreement defines "collocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purposes of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure."*[127] San Francisco's argument conflates the definition of "base station" adopted by the Commission for the limited purpose of adopting a shot clock under Section 6409 of the Spectrum Act[128] with the definition of "collocation" used under Section 332(c)(7) since the inception of the Section 332 shot clocks.[129] But San Francisco fails to note that in the same paragraph it references to support its argument, the Commission stated, "[w]e . . . disagree with municipal commenters who argue that collocations are limited to mounting equipment on structures that

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[125] San Francisco Comments at 18-21.

[126] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance,* Declaratory Ruling, 24 FCC Rcd 13994, 14012 at ¶ 46 (2009) ("*332 Shot Clock Ruling*"), *aff'd City of Arlington v. FCC,* 668 F.3d 229 (5th Cir. 2012), *aff'd, City of Arlington v. FCC*, 133 S.Ct. 1863 (2013), (citing *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,* codified at 47 C.F.R. Pt. 1, App'x B ("*Collocation Agreement"),* amended *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB Aug. 8, 2016) ("*Collocation Agreement Amendment*")).

[127] *Collocation Agreement* at Section I.B (emphasis added).

[128] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) ("Section 6409").

[129] San Francisco Comments at 20, (citing *2014 Infrastructure Order* at ¶ 179).

already have transmission equipment on them."[130] San Francisco's argument is plainly wrong and should be rejected by the Commission.

V. THE COMMISSION SHOULD MAKE CLEAR THAT SECTIONS 253 AND 332 APPLY TO WIRELESS FACILITIES EVEN IF WIRELESS INTERNET ACCESS SERVICE IS RECLASSIFIED AS AN INFORMATION SERVICE.

The Commission should find that Sections 253 and 332(c)(7) apply to wireless service and facilities, even if it re-classifies wireless broadband internet access service. In a separate proceeding, the Commission has proposed re-classifying broadband internet access service from a "telecommunications service" to an "information service," and from a "commercial mobile service" to a "private mobile service."[131] Regardless of the outcome of that proceeding, the Commission has authority under Sections 253 and 332(c)(7) to facilitate the deployment of wireless facilities.

Section 253 provides that states and localities may not impose requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service.*"[132] "Telecommunications services," which are subject to common-carrier regulation under Title II, are mutually exclusive from "information services," which are not.[133] Similarly, Section 332(c)(7) provides that states and localities may not, through regulation, "prohibit or have the effect of prohibiting the provision of personal wireless

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[130] *2014 Infrastructure Order* at ¶ 179.

[131] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60 WC Docket No. 17-108, 32 FCC Rcd 4434, at 6-8 (2017).

[132] 47 U.S.C. § 253(a) (emphasis added).

[133] *Fed.-State Joint Bd. on Universal Serv., Report to Congress*, 13 FCC Rcd 11501, 11507 at ¶ 13 (1998); *see also* 47 U.S.C. § 153(24) ("The term 'information service' ... does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

services," which are defined as "*commercial mobile services*."[134] Such "commercial mobile services," which are subject to Title II, are mutually exclusive from "private mobile services," which are not.[135] Accordingly, the proposed re-classification of mobile broadband services as non-Title II "information services" and "private mobile services" may raise questions about whether Sections 253 and 332(c)(7) continue to govern the deployment of wireless facilities.[136]

Notwithstanding these important distinctions in how wireless services may be regulated, the Commission has authority under Sections 253 and 332(c)(7) to facilitate wireless deployment. The Commission should make clear that Sections 253 and 332(c)(7) govern deployment of mixed-use wireless infrastructure that is (or can be) used to provide both Title II and non-Title II services.[137] Because broadband providers such as Verizon use such facilities to provide multiple types of services, state or local barriers to their deployment may "prohibit or have the effect of prohibiting" the provision of telecommunications services or commercial wireless services. Thus, the protections of Sections 253 and 332(c)(7) apply.

This approach is consistent with the Commission's approach to Section 332(c)(7) before it re-classified wireless broadband as a Title II service: "We clarify that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service that is classified as an

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[134] 47 U.S.C. § 332(c)(7)(B); *see id.* 332(c)(7)(C)(i) (emphasis added).

[135] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 713 (D.C. Cir. 2016).

[136] Some parties contend that Section 253 would not apply to broadband internet access service if the Commission were to reclassify the service as an information service. *See* Comments of Smart Communities and Special Districts Coalition, at 55; Comments of the Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County Washington, the New Jersey Access Group, and the Colorado Municipal League, at 15 (Jun. 15, 2017).

[137] *See* T-Mobile Comments at 52-54; Charter Comments at 25-26; Comcast Comments at 15-16; One Media Comments at 4 n.13.

'information service' where a wireless service provider uses the same infrastructure to provide its 'personal wireless services' and wireless broadband Internet access service."[138] It is also consistent with the Commission's approach to mixed use pole attachments, where it has "clarif[ied] that where a wireless service provider uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services, section 224 would apply."[139] There is no reason to diverge from the approach that the Commission has taken to mixed-use facilities in the past.

Furthermore, the Commission has authority to apply Sections 253 and 332(c)(7) where it would be impracticable or impossible to determine if a facility is being used to provide telecommunications service. Under Title I, the Commission has jurisdiction to promulgate "regulations [that] are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[140] To give meaningful effect to Sections 253 and 332(c)(7), the Commission must be able to set uniform standards for state and local regulation of wireless facility deployment. As a practical matter, it may be impossible or extremely burdensome to distinguish mixed use from single use facilities for purposes of applying these statutes, and the difficulty of drawing such a distinction may itself impose barriers to wireless facility deployment. That result is inconsistent with Congress's explicit charge to the Commission to promote the continued development of broadband and other wireless services,

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[138] *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901, 5915-20 at ¶ 63 (2007) ("*Wireless Broadband Declaratory Ruling*").

[139] *Id.* ¶ 60.

[140] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005).

particularly by removing barriers to infrastructure deployment.[141] Accordingly, under such circumstances, it is appropriate for the Commission to exercise its ancillary authority to apply Sections 352 and 332(c)(7) to facilities whose use is unclear or cannot be determined in advance.[142]

VI. THE COMMISSION HAS AUTHORITY TO STREAMLINE ITS HISTORIC PRESERVATION RULES.

The Commission has authority to streamline tribal and historic preservation reviews and should use that authority to remove barriers to small cell deployment. The Commission can and should clarify that tribal fees are neither appropriate nor required for initial reviews, adopt a 30-day response time for tribal reviews, establish a process for reviewing tribal areas of interest, and modify its Tower Construction Notification System ("TCNS") both to make it more transparent and to require tribes to identify more granular areas of interest.[143] As noted by CTIA and WIA, the Advisory Council on Historic Preservation ("ACHP") rules and guidance vest federal agencies with the flexibility to establish the right balance between each agency's mission and the

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[141] *See, e.g.*, 47 U.S.C. §47 U.S.C. § 230(b)(1) (announcing Congressional policy "to promote the continued development of the Internet and other interactive computer services"). In addition, the D.C. Circuit has held that Section 706(a) of the Act charges the Commission with the responsibility to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through, *inter alia*, "regulating methods that remove barriers to infrastructure investment." *See* 47 U.S.C. § 1302(a); *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014).

[142] Similarly, where it is impractical or impossible to separate the interstate and intrastate components of a service, the Commission has authority to promulgate uniform regulations applying to both components. *See, e.g.*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

[143] *See* Verizon Opening Comments at 44-53. *See also* Joint Comments of CTIA and the Wireless Infrastructure Association at 20-34 (Jun. 15, 2017) ("CTIA/WIA Wireless Infrastructure Comments") (asking for similar measures to streamline tribal reviews).

appropriate level of tribal consultation for each agency project.[144] And the ACHP recognizes this authority and flexibility, stating, "[r]ecognizing the assessment and payment of fees in Section 106 [of the National Historic Preservation Act] reviews is essentially a business transaction in which the ACHP has no role or expertise, the parameters for establishing and paying fees must be addressed and resolved by FCC."[145]

The Commission should apply its authority to provide guidance and establish procedures to streamline tribal reviews. Consistent with the ACHP recommendation that the Commission establish a "bright line test" for when tribal fees are appropriate,[146] the Commission should declare that tribal fees are neither necessary nor appropriate for the tribe's initial review of an application.[147] Consistent with its 2005 *Tribal Declaratory R*uling,[148] the Commission should interpret language in the *Nationwide Programmatic Agreement*[149] to find that unless an extension

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[144] *See* 36 C.F.R. § 800.3(c)(3) ("The agency official should consult with the [state historic preservation office/tribal historic preservation officer] in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties."); Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook,* § II.B (June 2012) ("Each agency defines the scope of its own trust responsibility towards tribes."); CTIA/WIA Wireless Infrastructure Comments at 19-20 .

[145] Advisory Council on Historic Preservation Comments at 2 (Jun. 15, 2017) ("ACHP Comments").

[146] ACHP Comments at 2 (recommending that the Commission consult with other federal agencies regarding the use of bright line test for determining when tribal fees are appropriate).

[147] *See* Verizon Opening Comments at 47-49; CTIA/WIA Comments at 20-23.

[148] *See Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092 (2005) ("*Tribal Declaratory Ruling*").

[149] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1152 (2004) (codified at 47 C.F.R. Part 1, App'x C ("*NPA*")), at §IV.F.4 ("Ordinarily, 30 days from the time the relevant

is agreed upon by the applicant and a reviewing tribe, tribes must complete reviews of projects in 30 days.[150] And consistent with its broad authority to conduct tribal reviews and its authority to implement and modify its own TCNS database, the Commission should require tribes to demonstrate the likelihood of the presence of tribal historic properties in areas designated by the tribe for reviewing proposed wireless facilities.[151] The Commission should also modify TCNS both to require tribes to designate areas of interest at the county level and to allow applicants to view tribal areas of interest at the project planning stage.[152]

The Commission also has authority to eliminate historic preservation reviews of certain wireless facilities siting activity either by determining that such activity does not constitute a "federal undertaking" or by adopting exclusions from historic preservation reviews. If the Commission finds that certain agency activities, including actions by Commission licensees to construct facilities, involve minimal agency oversight, then it can determine that such activities are not "federal undertakings" and are not subject to the provisions of the National Historic

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tribal or [Native Hawaiian Organization] representative may reasonably be expected to have received an inquiry shall be considered a reasonable time [to respond].").

[150] Verizon Opening Comments at 52-55; CTIA/WIA Comments at 27-28, Comments of General Communications, Inc. at 11-12 (Jun. 15, 2017). *See also* National Trust for Historic Preservation Comments at 3 (Jun. 15, 2007) ("The Nationwide PA includes a 30-day review period, and it appears that the FCC is failing to enforce that provision."); Comments submitted by National Congress of American Indians, United South and Eastern Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers at 17 (Jun. 15, 2017) (supporting Commission action to adopt a timeline for tribal review, but proposing a longer, open-ended process).

[151] Verizon Opening Comments at 51.

[152] *Id.* at 49-50; CTIA/WIA Comments at 29-33.

Preservation Act.[153] The Commission should exercise its authority and find that the mounting of small cells on existing structures is not a "federal undertaking."[154]

Even for activities deemed to be "federal undertakings," the Commission has authority under ACHP rules to exclude certain small cell deployments from historic preservation review if it determines that construction of small cells "is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties [are] present."[155] Verizon proposed that many small facilities do not have the potential to affect tribal or other historic properties and should be excluded from review. Although some challenged whether the Commission could conclude that no historic properties would be affected,[156] Verizon presented evidence demonstrating that the following narrowly crafted exclusions do not have the potential to affect historic properties:

- Excluding from tribal review only small cells that are either mounted on existing structures or mounted on new structures, provided that the small cells involve no new ground disturbance and meet existing Commission size limits for small cells. New

[153] *See* 54 U.S.C. §§ 306108, 300320. No party challenges the Commission's authority to define the scope of its undertakings, but the ACHP questions whether changes are justified, because rules providing for Commission review of environmental assessments submitted for wireless facilities have not changed. ACHP Comments at 7. Although changing the Commission's environmental assessment review rule is not necessary for the Commission to find that some small cell siting is not a federal undertaking, Verizon proposed that the Commission could adopt a categorical exclusion from that rule for small cells mounted on existing structures in conjunction with an action to find that their construction is not a federal undertaking. Verizon Opening Comments at 60-63.

[154] *See* Verizon Wireless Infrastructure Comments at 60-63. *See also* Comments of the Competitive Carriers Association at 47-48 (Jun. 15, 2017).

[155] *See* 36 C.F.R. § 800.3(a)(1).

[156] *See, e.g.,* National Trust for Historic Preservation Comments at 3 (arguing it is not appropriate for the Commission "to conclude that these activities have 'no potential' to cause effects to historic properties").

poles should be limited to 50 feet in height or not greater than ten percent taller than other structures in the area of the pole, whichever is greater;[157]

- Excluding non-tower pole replacements if (1) the pole being replaced is an existing structure and is being replaced in the same location, meaning no more than 30 feet from the original location; (2) the project does not involve excavation more than 30 feet from the original pole location, or, if the project is located within an existing right-of-way, the project footprint remains within the boundaries of the right-of-way; (3) the new pole does not increase the height by more than 10 percent or 10 feet above the height of the original pole, whichever is greater; (4) no existing historic preservation complaints are open against the pole being replaced; and (5) the replaced pole is not listed on the National Register of Historic Places or located within a National Historic Landmark District;[158]

- Expanding the existing industrial zone and rights-of-way exclusions to (1) include facilities located in transportation rights-of-way within the exclusion;[159] (2) eliminate the need for tribal consultation provided the project involves no new ground disturbance; and (3) limit the size of facilities in transportation rights-of-way within historic districts to Commission size limits for small cells and limit the height of new poles in such areas to 50 feet or no more than ten percent taller than other structures in the area of the pole, whichever is greater; and[160]

- Expanding the existing exclusion for small cells located outside of historic districts so that facilities located at least 50 feet from a historic district are excluded.[161]

The Commission should use its authority under ACHP rules to adopt these exclusions expeditiously.

[157] Verizon Opening Comments at 47-49.

[158] *Id.* at 54-56.

[159] *See* ACHP Comments at 6 ("The exclusion from Section 106 reviews for the construction of collocation of communication infrastructure along transportation corridors is a proposal that the ACHP can endorse.").

[160] Verizon Opening Comments at 56-57.

[161] *Id.* at 57.

VII. CONCLUSION.

As discussed above, the Commission should act quickly to exercise its statutory authority to eliminate barriers to wireless small facility deployment and pave the way for continued leadership in wireless broadband.

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